

4 Official Opinions of the Compliance Board 182 (2005)

EXECUTIVE FUNCTION EXCLUSION – SCHOOL BOARD’S INTERVIEW PROCESS FOR FILLING A BOARD VACANCY, HELD TO FALL WITHIN THE EXCLUSION

December 2, 2005

Mr. Bill Fisher
President
Education Association of Charles County

The Open Meetings Compliance Board has considered your complaint alleging that the Board of Education of Charles County (“County Board”) violated the Open Meetings Act by the process it used in filling a vacancy on the County Board during the spring of 2004. According to the complaint, the County Board plans to use the same process in connection with a recent vacancy.

For the reasons explained below, we conclude that the County’s Board’s process involves an “executive function.” Consequently, neither the substantive nor the procedural requirements of the Open Meetings Act apply, and the County Board does not violate the Act by interviewing and discussing candidates for a vacancy in meetings not open to the public.

I

Complaint and Response

The complaint asked that we review whether the process used by the County Board to fill a mid-term vacancy on the County Board violates the Open Meetings Act. According to the complaint, following the resignation of a member in 2004, the County Board advertised for candidates but refused to make public the names of applicants. Interviews were conducted “in secret.” The County Board has announced its intention to use the same process in filling a recent vacancy on the Board. The complaint explained that, while the County Board is elected, when a vacancy occurs during the course of a term, the remaining members select a replacement. The Education Association of Charles County is of the view that “the selection process, the candidates being considered, and the content of interviews should be public.”

In a timely response on behalf of the County Board, Eric B. Schwartz, a staff attorney with the Charles County Public School System, denied that the selection process violates the Open Meetings Act. The County Board’s position is that the

process involves an executive function to which the Act does not apply. The response cited § 3-501(d)(2) of the Education Article, Annotated Code of Maryland, addressing the manner in which a vacancy on the Charles County Board is to be filled: “The voting members of the County Board shall select a qualified individual to fill any vacancy on the Board for the remainder of that term and until a successor is elected and qualifies.”

According to its response, the County Board “will interview and discuss candidates outside of the public’s view, but will take its final vote to fill the vacancy in public,” consistent with the process used last year. The County Board cited in support of its position several prior opinions of the Compliance Board in which we evaluated whether the filling of a vacancy by a public body constituted an executive function outside the scope of the Open Meetings Act. The response also pointed out that, even if the interviews were subject to the Act, the meetings could be closed pursuant to § 10-508(a)(1)¹ as a personnel matter, a process that would not have resulted in the level of public disclosure desired by the complainant.

II

Analysis

The Open Meetings Act applies to a particular gathering if three things are true: the gathering involves a “public body” as defined in the Act, § 10-502(h); the gathering is a “meeting,” because it involves a quorum of the public body convened for the consideration or transaction of public business, § 10-502(g); and the topic of discussion at the meeting is one to which the Act applies. The County Board is a “public body,” and the selection process involves meetings of the Board. Therefore, the determinative question is whether considering candidates for a County Board vacancy is a topic to which the Act applies. More specifically, we must evaluate whether meetings for this purpose involve an “executive function.”

Subject to limited exceptions not applicable here, any meeting involving an executive function is outside the Act; neither the substantive nor the procedural requirements of the Act apply to an executive function. § 10-503(a)(1)(i). An executive function is defined as follows:

(1) “Executive function” means the administration of:

- (i) a law of the State;
- (ii) a law of a political subdivision of the State; or
- (iii) a rule, regulation, or bylaw of a public body.

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

(2) “Executive function” does not include:

- (i) an advisory function;
- (ii) a judicial function;
- (iii) a legislative function;
- (iv) a quasi-judicial function; or
- (v) a quasi-legislative function.

§ 10-502(d).

In applying the executive function exclusion, we have distilled the analysis into two distinct steps. First, does the topic of discussion fall within the definition of any other defined function? If it does, the statutory definition precludes it from being an “executive function.” Second, does the discussion involve “the administration of” a state or local law or a public body’s rule, regulation, or bylaw? If not, it cannot be considered an executive function. *See, e.g., 3 Official Opinions of the Maryland Open Meetings Compliance Board* 39 (Opinion 00-10) (2000) (addressing at some length the executive function in the context of various responsibilities of a local board of education).²

As the County Board explained, interviews and discussions concerning candidates for the Board will occur “outside of the public’s view.” However, the final vote to fill the vacancy will occur in a public session.³ We agree with the County Board that the part of the selection process that is not public under the process developed by the County Board involves an executive function, outside the scope of the Open Meetings Act.

² For brevity’s sake, we shall hereafter cite our opinion volumes as *OMCB Opinions*.

³ The decision to take the final vote in public is not based on requirements of the Open Meetings Act, but apparently on § 3-504 of the Education Article, which provides as follows:

(a) All actions of the County Board shall be taken at a public meeting and a record of the meeting and all actions shall be made public.

(b) This section does not prohibit the County Board from meeting and deliberating in executive session, provided that all action of the Board, together with the individual vote of each member, is contained in a public record.

In any event, our evaluation is limited to the application of the Open Meetings Act.

First, as the County Board correctly pointed out, its action does not involve any other defined function under the Act. While *approving* an appointment made by another official is a legislative function, *making* an appointment is not. *See, e.g., 1 OMCB Opinions 123 (1995) (Opinion 95-5)*. Second, the County Board is charged under the State education law with filling any vacancy on the County Board. Thus, in selecting a candidate, it is carrying out an administrative responsibility vested in it by State law.⁴

III

Conclusion

The Open Meetings Compliance Board finds that the County Board's process for evaluating candidates to fill a vacancy on the County Board does not violate the Open Meetings Act, because the Act does not apply.⁵

OPEN MEETINGS COMPLIANCE BOARD

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⁴ This situation is distinguishable from one discussed in a recent opinion, in which we concluded that the Carroll County Board of Education was not carrying out an executive function in developing a process for selecting a candidate for a board vacancy because, in that county, the Governor and not the local board was charged with filling the vacancy. 4 *OMCB Opinions 163 (2005)*.

⁵ In light of our conclusion, we find it unnecessary to address the County Board's alternative position that, even if the Act applied, the sessions could nevertheless be closed under § 10-508(a)(1), in that interviews involve a personnel matter.